U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 241 51836 Office: NEBRASKA SERVICE CENTER Date: NOV 17 2005

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides design and engineering services. It seeks to employ the beneficiary permanently in the United States as a designer/mechanical engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director further determined that the beneficiary did not meet the special requirements of the labor certification.

On appeal, counsel submits a brief and additional evidence.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 9, 2002. The proffered wage as stated on the Form ETA 750 is $79,810.64 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 1999.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of $700,000 and to currently employ 16 workers and 40 subcontractors. The petitioner did not list any net annual income. In support of the petition, the petitioner submitted a letter from its Chief Executive Officer (CEO) affirming its ability to pay the proffered wage and a pay statement for a check issued to the beneficiary on August 13, 2004 for $1,606, reflecting year-to-date wages of $27,963.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 5, 2005, the director requested additional evidence pertinent to that ability. In accordance with the regulation at 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or

audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Form 1120 corporate tax returns for the petitioner for the years 2002 and 2003 and an unaudited profit/loss statement for 2004. The tax returns and profit/loss statement reflect the following information:

	2002	2003	2004
Net income	($365,920)	($261,417)	($94,524)
Current Assets	$6,390	($5,817)	N/A
Current Liabilities	$1,563	$1,447	N/A
Net current assets	$4,827	($7,264)	N/A

In addition, the petitioner submitted Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2002, 2003 and 2004 reflecting wages of $36,885.28, $40,276.72 and $42,286.03 respectively. The difference between these wages and the proffered wage is $42,925.36 in 2002,[1] $39,533.92 in 2003 and $37,524.61 in 2004. The petitioner also submitted charts reflecting the petitioner's growth in revenues and income both domestically and with respect to its Romanian operations. Finally, the petitioner submitted financial statements for its Romanian subsidiary, GMAB Consulting SRL.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 20, 2005, denied the petition.

On appeal, counsel asserts the difference between the proffered wage and the wages paid after the priority date in 2002 is only $17,885.57; thus the petitioner need not demonstrate an ability to pay the full $42,925.36 deficit between the proffered wage and wages paid for that year. Counsel further asserts that GMAB had available $29,593 in 2002, $251,183 in 2003 and $727,929 in 2004. These numbers appear to derive from a May 11, 2005 letter from BRD Groupe Societe Generale to GMAB asserting that these amounts were sent to GMAB "unrolled through BRD." The petitioner submits a corporate diagram reflecting that the petitioner is part of the Geo-Beta Enterprises, LLC holding company and that GMAB and Euroam Industries are both subsidiaries of the petitioner. The petitioner submits bank statements and balance sheets for GMAB and GEO-BETA as well as evidence that both companies have transferred funds to the petitioner in the past. Counsel asserts that we should consider GMAB's total assets minus total liabilities. Finally, the petitioner submits its own bank statements and purchase orders dated in 2005.

Once the petitioner submits the initial documentation required by the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie*

[1] Counsel questions how the director calculated this number. We note that the proffered wage for the full year less the wages paid for the full year equals $42,925.36. We will address counsel's prorating arguments below.

proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002, 2003 or 2004.[2]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, as acknowledged by counsel, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority

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[2] While counsel has asserted that the petitioner "always pays its employees," its persistent failure to pay the proffered wage for the same position listed on the labor certification is not consistent with an ability to meet its full payroll responsibilities.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

date. CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period). The salient portion of 2002 after the priority date constitutes 40 percent of the year.[4] Forty percent of the proffered wage is $31,924.26. Forty percent of the wages actually paid in 2002, a year in which the beneficiary worked year-round, is $14,754.11. The difference between forty percent of the proffered wage and forty percent of the wages paid is $17,170.15. (Counsel, calculating weekly wages, determines the amount as $17,855.57, a higher number.) While CIS would not consider 12 months of income to cover the difference in wages for a lesser period, the petitioner does not rely on its net income as it has consistently shown a net loss.

The petitioner has not demonstrated that it paid the full proffered wage in 2002, 2003 or 2004. In all of these years, the petitioner shows a net loss. In 2002 and 2003, the petitioner shows negative net current assets. The record lacks evidence of the petitioner's net current assets in 2004. Thus, the petitioner has not demonstrated the ability to pay the difference between the wages paid and the proffered wage out of its own net income or net current assets. Thus, we must examine whether any other funds were available to pay the proffered wage.

Counsel's reliance on the assets of GEO-BETA is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). We will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Regardless, the petitioner's tax returns, Schedule E, Schedule K and the accompanying statements, reflect that the petitioner is owned 100 percent by Marioara Peretz. Thus, the record contains no evidence that GEO-BETA is the holding company for the petitioner as claimed.

Counsel's reliance on the balances in the petitioner's bank accounts and those in the accounts of its subsidiary is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the petitioner's tax return or the financial statements of the subsidiaries, such as the cash specified on Schedule L and on the balance sheets that were considered above in calculating net current assets.

Similarly the bank letter from BRD does not demonstrate that the "unrolled" funds were available to the petitioner to pay the proffered wage, as opposed to other liabilities. The 2005 invoices demonstrate that the petitioner continues to do business, but do not reflect funds that were available in 2002, 2003 or 2005.

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[4] The salient portion of 2002 includes 22 days of August, 30 days in September, 31 days in October, 30 days in November and 31 days in December, for a total of 144 days. One hundred forty four is approximately 40 percent of 365, the number of days in a year.

Even if we were to consider the financial statements for petitioner's subsidiary, GMAB, they contain the following information:

	2002	2003	2004
Net income	$28,409	$16,241	$43,048
Current Assets	$50,913	$43,198	$139,074
Current Liabilities	$74,570	$113,557	$182,206
Net current assets	($23,657)	($70,359)	($43,132)

GMAB had negative net current assets in all of the years. Assuming that all of GMAB's net income is available to its parent company, its net income is still insufficient in 2003 to cover the different between the proffered wage and the wages paid. Moreover, as stated above, we will not consider 12 months of income towards an ability to pay wages during a lesser period. The record does not reflect GMAB's net income between August 9, 2002 and the end of the year. Thus, these numbers also fail to demonstrate the petitioner's ability to pay the proffered wage in 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2002 or subsequently during 2003 or 2004. Even considering the net income of its subsidiary, the petitioner has not demonstrated its ability to pay the proffered wage in 2002 or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The Beneficiary's Qualifications

To determine whether a beneficiary is eligible for a third preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The only qualification at issue is the one specified in Block 15 of the labor certification, requiring that the alien be a "certified Unigraphics (UG) Instructor." The petitioner initially submitted certification as a "Unigraphics Master User" from Unigraphics and four General Motors certificates demonstrating the completion of various Unigraphics courses.

The director requested evidence that the beneficiary was a certified Unigraphics Instructor. In response, the petitioner submitted an affidavit from the beneficiary asserting that he no longer possessed the actual

certificate and chronicling his unsuccessful efforts to obtain a duplicate. The director concluded that the affidavit was "self-serving" and that the petitioner had not established that the beneficiary was a certified Unigraphics Instructor.

On appeal, the petitioner submits certification as a Unigraphics Instructor from the General Motors Knowledge Center. The regulation at 8 C.F.R. § 103.2(b)(2) provides:

> *Submitting secondary evidence and affidavits.* (i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The petitioner provided no evidence other than his own affidavit regarding the unavailability of primary evidence. Thus, the director did not err in rejecting the affidavit. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence or documented its unavailability. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.